IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

FEDERAL POWER COMMISSION,
Petitioner,
vs.
HOPE NATURAL GAS COMPANY,
Respondent,
No. 34

CITY OF CLEVELAND,
Petitioner,
vs.
HOPE NATURAL GAS COMPANY,
Respondent.
No. 35

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

APPLICATION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, and BRIEF AND ARGUMENT OF CITIES SERVICE GAS COMPANY, AS *AMICUS CURIAE*.

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} No. 35

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE.*

Comes now Cities Service Gas Company, applicant, and informs the Court:

I.

That Cities Service Gas Company is a private corporation, organized and existing under the laws of the State of Delaware, and is authorized to do business in the states of

Oklahoma, Texas, Missouri, Kansas and Nebraska; and owns and operates a natural gas production and transmission pipeline system extending from numerous fields in the states of Texas, Oklahoma, Kansas and Missouri to approximately 265 cities, towns and communities in the above mentioned states, the greater part of its business being the "sale in interstate commerce of natural gas for resale," and, with respect to such sales for resale, is subject to the rate-regulatory jurisdiction of the Federal Power Commission under Sections 4 and 5 of the "Natural Gas Act."

II.

That on October 20, 1939, the Federal Power Commission in its Docket No. G-141 instituted an investigation of the rates, charges and practices of said Cities Service Gas Company, upon which order hearings were begun on November 30, 1942 and concluded February 2, 1943; and which resulted in an interim order issued by said Commission on July 28, 1943.

In said interim order the Commission in making its determination of rate base excluded all evidence of "fair value" of the plant and property of this applicant; that had the Commission found a rate base upon present "fair value" of the property, plant and enterprise of the company, such rate base would have been greatly in excess of the so-called "actual legitimate cost" rate base so actually determined and adopted by the Commission in the amount of $48,567,756; that by the use of said rate base, as found by it, the Commission ordered an annual reduction in the revenues of Petitioner of $4,445,871; that such reduction could not have been ordered had the present "fair value" been determined and adopted by the Commission; that by reason of the rejection of the principle of present "fair value" as the rate base of said Cities Service Gas Company, the Commission could not validly determine whether or not the rates and charges of said Company were reasonable or unreasonable, or whether or not any reduction should be made therein, and, if made, the proper and legal amount thereof; and that by reason of all of which the rights of this company have been denied and violated.

That one of the decisive issues in said case as between

the Federal Power Commission and said Cities Service Gas Company was and is the denial and exclusion by the Commission of the governing principle of "fair value" in the determination of the rate base of this applicant. Said interim order (Docket No. G-141) in that behalf declares:

"Exclusion of 'Fair Value' Evidence.

"At the threshold, we are met with the Company's contention that the trial examiner improperly excluded evidence of reproduction cost and *so-called* 'fair value' of the properties. Our views as to why such evidence should be excluded have been stated in earlier opinions (Citing: Detroit v. Panhandle Eastern Pipe Line Company et al., 45 P.U.R. (n.s.) 203, 208-210; Re Chicago District Electric Generating Company, 39 P.U.R. (n.s.) 263, 269-272), and need not be amplified here."

(Comm. Op. No. 95, p. 6.)

* * * * *

"(3) No necessity was shown for the consideration in this proceeding of the Company's evidence of * * * 'fair value' of its property."

* * * * *

"(6) The actual legitimate cost before depreciation, within the meaning of Section 6(a) of the Natural Gas Act of the Company's gas plant used and useful, as of December 31, 1941, is not more than $66,977,654."

Note: After deduction therefrom of so-called "depreciation and depletion" as found by the Commission in the amount of $21,804,449, and the addition thereto of "construction work in progress" in the amount of $1,576,357, and "working capital" in the amount of $1,818,194, the resulting figure of $48,567,756 is designated and adopted by the Commission as the "rate base."

(Comm. Order, Docket No. G-141, July 28, 1943, pp. 1, 2, 3.)

III.

That, being dissatisfied with said interim order, said Cities Service Gas Company, in the manner provided by law, is reviewing said order of the Commission by appropriate proceedings now pending in the United States Circuit Court of Appeals for the Tenth Circuit, that being the Court having jurisdiction to review said order under the "Natural Gas

Act," which case is entitled and numbered as follows: "*No. 2813, Cities Service Gas Company, a Corporation, Petitioner, vs. Federal Power Commission, Public Service Commission of the State of Missouri, and the City of Kansas City, Missouri, Respondents.*"

IV.

That the exclusion of the principle and elements of present "fair value" is one of the decisive issues in the cause of *Federal Power Commission v. Hope Natural Gas Company*, (No. 34) in which this application is filed; for that in its said opinion and order now under review in this said cause, the Commission rejected and discarded the principle of "fair value" and adopted so-called "actual legitimate cost" as the rate base of Hope Natural Gas Company. The order of the Commission in that behalf finds and declares:

> "With the decline in favor of the doctrine of 'fair value' as the only mode of public utility rate regulation, its keystone, reproduction cost, crumbles. Bona fide investment figures now become all important in the regulation of rates."
>
> • • • • •
>
> "(18). For the purpose of determining just and reasonable rates for the future, the rate base represented by the actual legitimate cost of the Company's property used and useful in the production, transportation and sale of natural gas in interstate commerce (Finding (13)), plus inoperated acreage, working capital, and future net capital additions is $33,712,526."
>
> *(Comm. Opinion 76 and Order, Docket Nos. 100, 101, 127, 113, May 26, 1942, p. 4.)*

That said issue of "fair value" will be considered and determined by this Court in this said cause No. 34, as this applicant verily believes; and this applicant, in the protection of its own rights and in its own behalf, desires by brief *amicus curiae* to present said issue of present "fair value" to this Court, believing that the decision of this Court in this case will be conclusive of the same issue in applicant's case now pending as aforesaid, before the United States Circuit Court of Appeals for the Tenth Circuit.

V.

That the Solicitor General of the United States and Respondent, Hope Natural Gas Company, have consented to

the filing of brief by this applicant as *amicus curiae*, as herein prayed.

That Petitioner, Federal Power Commission, although requested so to do, has refused to accord its consent to the filing of such brief, *amicus curiae*. The consent of the City of Cleveland in Case No. 35 has not been obtained.

Wherefore, applicant, Cities Service Gas Company, respectfully prays that it be allowed to file its brief as *amicus curiae* upon the issue of present "fair value" as the controlling principle of "rate base" under the Natural Gas Act and the law of the land.

CITIES SERVICE GAS COMPANY,
By DONALD C. MCCREERY,
1217 First National Bank Bldg., Denver, Colorado.

A. M. EBRIGHT,
Bartlesville, Oklahoma.

ROBERT D. GARVER,
700 Scarritt Building,
Kansas City, Missouri.
Counsel.

State of Colorado,
City and County of Denver. } ss.

Donald C. McCreery, being first duly sworn, on his oath deposes and says: he is one of counsel for Cities Service Gas Company, applicant above named; that he is authorized by said Corporation to execute the foregoing application and this verification on behalf of said Corporation; that he has read and well knows the contents of said application; and that the matters and facts therein stated and contained are true, as he verily believes.

DONALD C. MCCREERY.

Subscribed and sworn to before me this 11th day of October, 1943.

MARGARET M. DUNCAN,
Notary Public.

My commission expires December 28, 1943.
(Notarial Seal)

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BRIEF AND ARGUMENT OF CITIES SERVICE GAS COMPANY, *AMICUS CURIAE*.

The Principle of "Fair Value."

The concept of "value" is inherent in rate-regulatory control. Upon the exercise by government of the right to require that the rates of public utilities be "reasonable," it was found that the fundamental and necessary measure or test of such reasonableness was the amount or value of the property so devoted to the public service, for the use of which the utility is entitled to compensatory return.

In the application of the developing principles of rate regulation, the "value" of the utility property became the accepted and basic test of reasonableness of rates. *(Stone, et al. v. Farmers Loan and Trust Co.* (1886), 116 U. S. 307, 6 Sup. Ct. 334, 335, 345; *Dow, et al. v. Beidelman* (1888), 125 U. S. 680, 8 Sup. Ct. 1028, 1029, 1030, 1031.) Ten years later, in 1898, this Court in *Smyth, et al. v. Ames, et al.*, 169 U. S. 466, 18 Sup. Ct. 418, accepted the foundation of "fair value" theretofore established and applied as the rate base, and concerned itself with the appropriate and permissible evidence and procedure "to ascertain that value."

"It is the settled rule of this Court that the rate base is present value."

United Railways v. West (1930), 280 U. S. 234, 50 Sup. Ct. 123, 126;

Los Angeles Gas & Electric Corp. v. Railroad Commission, et al. (1933), 289 U. S. 287, 53 Sup. Ct. 637;

Denver Union Stock Yard Co. v. United States et al. (1938), 304 U. S. 470, 58 Sup. Ct. 990;

Federal Power Commission v. The Natural Gas Pipeline Company (1942), 315 U. S. 575, 590, 62 Sup. Ct. 736.

The principle of "fair value" in rate regulation is not the result of any one case; it is the course of decision and established fundamental law for more than half a century, declared and re-declared through the years by this Court and other Federal Courts.

Unless "fair value" as the rate base of a utility has been *constitutionally* and *authoritatively* discarded, it continues to be "the law of the land."

In this brief our discussion will be confined to the one point (not including the constitutional question), whether or not the principle of "fair value" as the rate base of a utility has been discarded and repudiated by law, that is, by the Federal Power Act, the Natural Gas Act, or otherwise.

Rejection by Federal Power Commission of Principle of "Fair Value."

The Federal Power Commission, in a series of decisions beginning with "*In the Matter of Chicago District Electric Generating Corporation*" *(July 16, 1941)*, 39 P.U.R. (n.s.) 263, and culminating with its latest decision "*In the Matter of Cities Service Gas Company*" (Commission Docket No. G-141, *July 28, 1943)* (not yet officially reported), under authority asserted to have been delegated to it by Congress in *Section 208* of the Federal Power Act, and in *Section 6* of the Natural Gas Act, has condemned the principle of "fair value" and substituted therefor that which is variously described by it as "actual legitimate cost," "prudent investment," and "net investment" rate base.

Whatever doubt there might be as to the definite purpose of the Commission and the precise meaning of the language employed by it *in the earliest of its decisions* above referred to, is now completely dissipated in its latest decision. We quote briefly from the several decisions in question:

In the *Chicago District Electric Generating Corporation* case *supra*, the Commission declared:

"* * * There is no difficulty whatever in ascertaining promptly and accurately from the books of the respondent the cost of, or the prudent investment in, its property.

"The answer to the problem of whether we have been authorized by Congress to disregard reproduction cost evidence in fixing the rate base is to be found in §208(a) of the Federal Power Act, 16 USCA §824g. That section provides:

" 'Section 208. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.'

"We are thus authorized, in the first instance, to investigate and ascertain the actual legitimate cost of the property of every public utility. We are likewise authorized to ascertain the depreciation therein. *It is when*

we find it necessary for rate-making purposes in specific cases that we may determine other facts bearing on the 'fair value' of such property.

* * * * *

"Congress clearly evinced a definite departure from the fair value doctrine of Smyth v. Ames. * * * *Congress recognized the fair value doctrine as an impediment to rate making.* * * *

* * * * *

"The facts in this proceeding are particularly appropriate for the determination of a rate base strictly on a prudent investment basis. *This is a situation peculiarly suitable for the application of the statutory power granted us* 'to escape the fog into which speculations based on Smyth v. Ames (1898), 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418, have enveloped the practical task of administering systems of utility regulation.'

* * * * *

"* * * We conclude, therefore, that the rate base in this case is the actual legitimate cost * * *." (Emphasis ours.)

Re Chicago District Electric Generating Corp., 39 P.U.R. (n.s.) (1941), 263 at pp. 269, 270, 272.

In the *Panhandle Eastern Pipe Line Co.* case, the Commission said:

"Having been authorized by the Congress to determine in the first instance the actual legitimate cost of utility properties and the depreciation therein, we conclude that the rate base is the actual legitimate cost of the property used and useful in furnishing the service, * * *. It is certain from the record that no necessity exists requiring the consideration of other facts in determining a rate base in these proceedings. * * *"

Detroit v. Panhandle Eastern Pipe Line Co., 45 P.U.R. (n.s.) (1942), 203, at p. 210.

In the *Hope Natural Gas Company* case, the Commission stated:

"*With the decline in favor of the doctrine of 'fair value'* as the only mode of public utility rate regulation, its keystone, reproduction cost, crumbles. Bona fide investment figures now become all important in the regulation of rates. * * *

* * * * *

"Accordingly, we begin with the book cost in the determination of the actual legitimate cost or investment in the facilities used in the company's interstate business. • • •

• • • • •

"After considering the evidence based upon the vouchers, books, and records of the company, and as a result of the application of fundamental principles of accounting, cost determination and equity, the Commission finds, in the words of §6(a) of the act, 16 U.S.C.A. §799(a) the actual legitimate cost. • • •

• • • • •

"This actual legitimate cost is predicated upon facts and it is the best evidence in these proceedings, so we will employ it for determining the proper and allowable rate base." (Emphasis ours.)

Cleveland and Akron v. Hope Natural Gas Company, 44 P.U.R. (n.s.) (1942), 1 at pp. 14, 15, 16.

In the *Cities Service Gas Company* case, *supra*, the Commission makes findings and orders *inter alia*, as follows:

"*Exclusion of 'Fair Value' Evidence.*

"*At the threshold, we are met with the Company's contention that the trial examiner improperly excluded evidence of* reproduction cost and *so-called 'fair value' of the properties.* Our views as to why such evidence should be excluded have been stated in earlier opinions (Citing: Detroit v. Panhandle Eastern Pipe Line Company et al., 45 P.U.R. (n.s) 203, 208-210; Re Chicago District Electric Generating Company, 39 P.U.R. (n.s.) 263, 269-272), and need not be amplified here."

(Comm. Op. No. 95, p. 6.)

• • • • •

"(3) No necessity was shown for the consideration in this proceeding of the Company's evidence of • • • 'fair value' of its property."

• • • • •

"(6) The actual legitimate cost before depreciation, within the meaning of Section 6(a) of the Natural Gas Act of the Company's gas plant used and useful as of December 31, 1941, is not more than $66,977,654."

Note: After deduction therefrom of so-called "deprecia-

tion and depletion" as found by the commission in the amount of $21,804,449, and the addition thereto of "construction work in progress" in the amount of $1,576,357, and "working capital" in the amount of $1,818,194, the resulting figure of $48,567,756 is designated and adopted by the Commission as the "rate base." (Emphasis ours.)

(Comm. Order, Docket No. G-141, July 28, 1943, pp. 1, 2, 3.)

It thus is made entirely clear from the quoted portions of the Commission opinion and order in the *Cities Service Gas Company* case, *supra*, that in excluding all evidence of "fair value," the principle of "fair value" was discarded and repudiated in its entirety. It is also now equally clear, from the citation in *The Cities Service Gas Company* opinion, of its earlier decisions above referred to, that the Commission intended from the outset to overrule completely the principle of "fair value" as well as the formula of "reproduction cost". The authority asserted thus to revolutionize the law of "rate base," the Commission, at sundry times, has sought to justify and legalize.

The numerous and inconsistent positions of the Commission (1935-1940, 1940, 1941-1943), with respect to the principle of "fair value," and the significant chronology thereof, are set forth in *Appendix D* hereto. This is done, not because that body possesses any legislative or judicial functions, for it is elementary that it does not have any such powers. The Commission, a mere administrative agency of government, is a creature of statute, with limited powers measured by "the ambit of the statutory authority," which Congress could and did delegate to it. *The very fact of the variant Commission contentions, however, does reflect the determination of the Commission, by direction and indirection, to re-make the established law of rate base.*

Such Commission Rejection of "Fair Value" is Unauthorized by and Contrary to Provisions of the Natural Gas Act.

The contention *presently relied upon by the Commission* is that, by *Section 6* of the Natural Gas Act (and similarly by *Section 208* of the Federal Power Act), established or authorized so-called "actual legitimate cost" as the rate base of utilities. To this contention we address ourselves.

Section 6 of the Natural Gas Act is as follows:

"*Ascertainment of Cost of Property*".

"Section 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

"(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction."

The Commission utilizes its own theories of rate base by construing the language of the section to mean that "fair value" is "gone with the wind" except "in specific cases" when original or historical cost is not available from the books of the utility. However, the normal and straightforward meaning of the language of the section, which as we will point out is the Congressional construction thereof, is that thereby the Commission is given a two-fold authority: (1) in connection with and to facilitate in the public interest its broad supervisory control under the Act over all "natural gas companies," whether or not subject to the Commission's rate-regulatory control, to ascertain certain facts with respect to every such "natural gas coinpany" (See *Amer. Tel. & Tel. Co. v. United States*, 299 U. S. 232, 237-242, 57 Sup. Ct. 170, 172-174); and (2) additionally, "for rate making purposes," (not merely and only "in specific cases") all facts "necessary" to be ascertained in such cases.

Under the Commission construction of *Section 6 (a)*, it never could be "found necessary" to "ascertain fair value," because "cost" obviously is as capable of estimate as is "fair value." In a cost appraisal where actual cost figures are not available, an estimate of cost properly may be made (*Amer. Tel. & Tel. Co. v. United States* (1936), 299 U. S. 232, 244, 57 Sup. Ct. 170). The effect of their argument is *totally* to eliminate "fair value." The argument thus refutes itself.

The Commission construction also carries with it the implied imputation (aside from the constitutional questions posed) that Congress manifested a legislative intent, **through indirection,** to outlaw "fair value" and clothe the Commission with authority to impose its so-called "actual legitimate cost" rate base.

We believe there is neither doubt nor ambiguity nor indirection in the congressional enactment. It is our conviction that an examination of what Congress was asked to do by the Power Commission, of what Congress in fact did, and of what Congress formally declared it was doing, conclusively, completely and finally disposes of the Commission contention that "fair value" was cast aside and so-called "actual legitimate cost" substituted therefor by *Section 208* of the Federal Power Act and by *Section 6* of the Natural Gas Act.

Accordingly, we direct consideration to that portion of the legislative history of the statutory language in question, which shows the following:

1. The draft of the section as prepared by and presented to the Congress by the Federal Power Commission *(Appendix A hereto,* pp. iii-iv).

2. The presentation to Congress, on behalf of the Commission, by *Commissioner Seavey* and *Commission Solicitor DeVane,* of the Commission proposal that "fair value" as the rate base be discarded and written out of the law of the land, and that so-called "actual legitimate prudent cost" be substituted by Congress therefor *(Appendix A hereto,* pp. v-xxi).

3. The direct, pointed and striking refusal of Congress so to adopt the proposal of the Power Commission, visually demonstrated by a *composite* of the section, *as proposed* by the Power Commission and *as enacted* by the Congress *(Appendix B hereto,* p. xxii).

4. The Joint Report of Senate and House Committees on Interstate Commerce re Natural Gas Act, showing that there was no slightest Congressional intention to depart from or discard "fair value" as the rate base of utilities *(Appendix C hereto,* pp. xxiv, xxv, xxvi-xxvii, xxix).

Numerous significant facts emerge from a consideration of the foregoing steps in the legislative action.

Section 208 of the Federal Power Act, entitled "Ascertainment of Cost of Property," of which *Section 6* of the Natural Gas Act is an exact counterpart, except for the necessary substitution of the term "natural gas company" for the term "public utility," was drafted not by Congress but by the Federal Power Commission *(Appendix A hereto,* page ii). As so drafted (page iv) and urged before the Congress by Commission spokesmen (pages x-xvi, xvii-xxi), "actual legitimate prudent cost" was authorized as the rate base. *This proposal was rejected by Congress (Appendix B hereto,* p. xxii). The antithesis between the Commission proposal and the Congressional enactment is thereby made evident.

In the *Commission draft of Section 208* (originally numbered *211)* of the Federal Power Act, as prepared and presented to Congress by the Power Commission, there was included a third paragraph as follows:

> "(c) In determining just and reasonable rates, the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question."

By this subsection "actual legitimate prudent cost" was specifically made the rate base. It will be noted also that subsections (a) and (b) of the Section as drafted and proposed by the Commission, which were specifically "built up" to and coordinated into subsection (c), made the provisions of the section as a whole, including the "actual legitimate prudent cost" rate base in subsection (c), applicable to the entire Power Act. These subsections also provide that the ascertainment of cost shall be limited to "actual legitimate prudent cost" as the rate base and for all purposes of the Act. As drafted, the entire section is an express determination, declaration and fixation of a new statutory rate base, fundamentally inconsistent with the principle of "fair value." That was the very purpose and object of the Commission draft, as both Commissioner Seavey and Solicitor DeVane declared in insisting upon its enactment by Congress, *(Appendix A*, pp. v, x, xii, xvii-xviii, xx). The legislative policy thus proposed, posed directly the issue of the so-called "prudent cost rate base" as against the "fair value" rate base, under long established law *(Appendix A*

hereto, p. xix). In this connection we quote from the presentation of both Commissioner Seavey and Solicitor DeVane:

"I think probably I should refer to section 211 in its entirety, but particularly I want to address a few remarks to 211 (c).

"Section 211 authorizes the Commission to ascertain the actual prudent cost of the property of every public utility under its jurisdiction and to require the utilities to file inventories of their property and its cost. It directs the Commission to keep itself informed of the cost of all additions and betterments to utility property. And it provides that in determining just and reasonable rates, the Commission shall fix rates which will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question. Rate regulation must eventually be based on prudent investment. Recent decisions of the Supreme Court and the respect which the Court has always paid to the constitutional interpretations of the coordinate branches of the government afford grounds for hope that this highly desirable result will be accomplished if the Congress should now definitely adopt the prudent cost rate base. This would present the case to the Court in a new light with a declaration of national policy that it has never had before."

(*Appendix A*, pp. v, xviii.)

However, subsection (c) was stricken in its entirety by Congress. Moreover, there was also stricken by Congress the provisions of subsections (a) and (b) which constituted a "build-up" to and coordination of these subsections into the rate base structure set up in subsection (c). Subsections (a) and (b) were merged by Congress, and in the merged section there remained but one concept described by Solicitor DeVane as follows:

"• • • I directed your attention to 211 (a) this morning as being complementary to State regulation. Section 211 (a) will secure a body of information, which I think is most valuable in the administration of this act and as an aid to the State commissions in their regulation of consumers."

(*Appendix A*, p. xviii.)

And yet the Commission contends in its decisions, *supra*,

that the section *as passed by Congress*, containing no provision of any kind as to rate base, means identically the same thing as if the section as proposed by the Commission and as stricken by Congress had remained in the Act.

Composite of *Section 208* of the Federal Power Act, as proposed by the Power Commission and as enacted by Congress, will be found in Appendix B hereto (p. xxii).

Such composite is a visual demonstration of the important and decisive fact that the language of the *Commission draft* and the language of the *Congressional enactment* not only do not mean or state the same thing but also are divergent and inconsistent in intent, meaning and statement. *Congress after deliberate consideration has spoken specifically and authoritatively and its declaration of legislative policy and enacted law can not be ignored or explained away or repudiated.*

The Commission contention is directly contrary to that which the Joint Committee's Report *(Appendix C hereto,* page xxix) declared to be and obviously is the meaning of *Section 6(a)* of the Gas Act (and *Section 208* of the Power Act) as enacted. We quote from that Report:

> "Subsection (a) authorizes the Commission to investigate and ascertain the actual legitimate cost of property, depreciation and other necessary facts for rate making purposes."

The Committees evidently considered it desirable also to reflect the views on the legislation entertained by the "National Association of Railroad and Utilities Commissioners" and so incorporated in their Joint Report as in harmony with the views of the Committees, a resolution adopted by the Executive Committee of that Association, wherein, among other things, it is said:

> "The bill provides for regulation along recognized and more or less standardized lines. *There is nothing novel in its provisions, and it is believed that no constitutional question is presented.*" (Emphasis ours.)
>
> *(Appendix C hereto,* pages xxvi-xxvii.)

Clearly then Congress evinced no intent to authorize or establish the statutory rate base proposed by the Commis-

sion and thus discard "fair value". *Section 6*, as we have seen from the testimony of *Solicitor DeVane*, becomes a mere authorization to "investigate and ascertain" certain facts referred to by Congress.

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Assns.* (1940), 310 U. S. 534, 543; 60 Sup. Ct. 1059, 1063.

Such is the record. Yet this Court is "asked to brush all this aside and simply to decree * * * anyway" that Congress, by *Section 6* of the Natural Gas Act and by *Section 208* of the Federal Power Act, intended to and did repudiate the principle of "fair value" as the rate base of electric utilities and natural gas companies. The issue is squarely presented whether or not Congress intended in *Section 6* to challenge, override or repudiate the principle of "fair value." If it did, that intention must affirmatively appear from the legislation itself or the authoritative meaning attributed to it by the Congressional Committees which managed the bill. The legislative record shows what was *proposed* by the Power Commission and why, also what was *in fact* enacted, and finally what the managing committees of Senate and House declared before its enactment to be the purpose and meaning of the statutory language. Congress flatly refused to do that which the Power Commission proposed. There is not one word from committees or members of Congress to the contrary.

As shown in *Appendix D* hereto, it was about five years (July 16, 1941) after the enactment of the Federal Power Act (August 26, 1935) that the Power Commission **for the first time,** declared that *Section 208* of the Power Act authorized it by fiat to discard the principle of "fair value." This is the meaning now attributed by the Commission to the language of its opinion *In the Matter of Chicago District Generating Corporation, supra,* (July 16, 1941), in the Commission opinion *In the Matter of Cities Service Gas Company, supra,* (July 28, 1941). No utility company, however cautious, during the elapsed interval of eight years since the passage of the Federal Power Act in 1935, could have

learned that the principle of "fair value" had been abrogated, for there is and has been no source of law from which it could ascertain that fact.

It is incredible, had Congress passed or intended to pass a law challenging or abrogating the well known and fully established course of "constitutional decision of this Court" as to "fair value," that it or its committees did not make "at least one clear statement of that purpose." On the other hand, the comparison of the legislation *as proposed* and *as enacted* discloses an express and specific legislative policy, determination and adjudication after extensive hearings, not to cast aside the principle of "fair value."

Nor can the Power Commission "sustain its position by a literal reading" or interpretative construction of the language of *Section 6(a) as enacted,* for therein is to be found not one word or phrase suggesting or remotely implying the repudiation of the principle of "fair value."

The Commission contention is a distortion, not a construction, of the section. The legislative history of the statute squarely conflicts with the Commission position.

We quote somewhat at length from the recent opinion of this Court announced by *Mr. Justice Jackson* in *Helvering v. Griffiths,* wherein the facts, circumstances, applicable reasoning and controlling rules of law are strikingly analogous to the situation here presented and accordingly are applicable in this discussion.

> "The question in this case is whether the Acts of Congress and the administrative regulations thereunder afford a basis on which we may reconsider the decision in Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570, and pass on the Government's request that it be overruled.
>
> * * * * *
>
> "The tax is asserted under the general provisions of §22(a) of the Internal Revenue Code, 26 U.S.C.A. Int. Rev. Code §22(a), that income includes 'dividends,' together with the specific provision of §115 (f) (1), 26 U.S.C.A. Int. Rev. Code §115 (f) (1), that: 'A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated

as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution.'

"Was Congress thereby saying that such a dividend as we have here is not being taxed, in view of the Eisner v. Macomber decision, or was it saying that regardless of that decision it is being taxed? * * *

* * * * * *

"On March 3, 1936, the President had suggested the enactment of a tax upon the undistributed income of corporations. On March 26, 1936, and while the taxpayer's petition for certiorari in the Koshland case was pending, a Subcommittee of the House Ways and Means Committee recommended that such a tax be enacted in lieu of the existing capital-stock, excess-profits, and income taxes on corporations. It was thought by some authorities that imposition directly upon shareholders of a tax based on their pro rata shares of corporate earnings would be more satisfactory than the undistributed profits tax. Serious consideration of this method, which had been employed in earlier times, was foreclosed by the belief that Eisner v. Macomber made it 'impossible' to put into effect.

"The statements of members of Congress and of responsible Treasury officials at the hearings and debates on the Act *are at variance with the present assertion of the Government that Congress intended §115 (f) (1) to challenge or override the decision* to which it had in other sections of the Act accommodated itself.

* * * * * *

"In this state of affairs the Treasury issued Regulations which plainly construed §115 (f) (1) not as repudiating Eisner v. Macomber by taxing stock dividends but as exempting them and adopting the existing decisions, including Eisner v. Macomber.

* * * * * *

"We think if Congress had passed or intended to pass an Act challenging a well known constitutional decision of this Court there would at least one clear statement of that purpose appear either from its proponents or its adversaries. Not one contemporaneous word in or out of Congress discloses the purpose which the Government says we should find that this legislation accomplished.

"Against this background, it was proposed to incorporate an undistributed profits tax in the pending Revenue Act for 1938. As proposed and enacted, §115 (f) (1) was the same as in the 1936 Act. Like earlier Acts, the Revenue Act of 1938, as proposed and enacted, contained provisions intended to conform with the authority of Eisner v. Macomber, and it was attacked as embodying the principle of forcing the distribution of needed corporate assets. * * *

* * * * *

"* * * Despite these factors, *again there was not the slightest suggestion of the view that §115 (f) (1) had made or had intended to make all stock dividends taxable;* on the contrary there was continued recognition of the authority of Eisner v. Macomber. * * *

* * * * *

"*The Government says that the time has come when Eisner v. Macomber must be overruled,* and that we should construe §115 (f) (1) as intended to tax the dividends here in question and thus to require reconsideration of that decision. *It should be observed that the question of the constitutional validity of Eisner v. Macomber is plainly one of the first magnitude; but this is not to say that it is presented in this case. Under our judicial tradition we do not decide whether a tax may constitutionally be laid until we find that Congress has laid it. Unless the tax asserted by the Commissioner has been authorized by Congress it fails of validity before we even reach the constitutional question. To reach that question we must decide whether Congress intended by §115 (f) (1) to do what Eisner v. Macomber squarely held that it could not. We cannot find that it did.*

"The Government cannot sustain its position on a literal reading of §115 (f) (1). * * *

* * * * *

"*The administrative and legislative history of the statute squarely conflict with the Government's position in this case.*

* * * * *

"*We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability.* If he consulted the decisions of this Court,

he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the Congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the Government. *But we are asked to brush all this aside and simply to decree that these transactions are taxable anyway.*

* * * * *

"*We are unable to find that Congress intended* to tax the dividends in question, *and without Congressional authority we are powerless to do so.* That being the case, we cannot reach the reconsideration of Eisner v. Macomber on the basis of the present legislation and regulations."

Helvering v. Griffiths (March 1, 1943) ..... U. S. ....., 63 Sup. Ct. 636, 637, 639-640, 645, 645-646, 647, 648, 652-653, 653.

This Court speaking through *Mr. Justice Black* recently also has declared:

"Whether or not one agrees with the committees that the cited cases constituted an unduly restricted interpretation of the Clayton Act, one must agree that the committees and the Congress made abundantly clear their intention that what they regarded as the misinterpretation of the Clayton Act should not be repeated in the construction of the Norris-LaGuardia Act. *For us to hold, in the face of this legislation,* that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, *would run counter to the plain mandate of the act and would reverse the declared purpose of Congress.*"

Milk Wagon Drivers' Union, etc. v. Lake Valley Farm Products, Inc., et al., 311 U. S. 91, 103, 61 Sup. Ct. 122, 128.

Conclusion.

If as we believe conclusively appears from the record, there is no basis whatever "to find that Congress intended to challenge or override" the principle of "fair value," then this Court, as declared by it, *supra*, being "without Congressional authority" is "powerless to do so," for Congress by "the plain mandate of the act" has abundantly made clear its legislative policy and purpose in that respect.

Respectfully submitted,

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APPENDIX A.

Excerpts From Part I.

"HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, SEVENTY-FOURTH CONGRESS,

FIRST SESSION,
ON
H. R. 5423

TO PROVIDE FOR CONTROL IN THE PUBLIC INTEREST OF PUBLIC UTILITY HOLDING COMPANIES USING THE MAILS AND THE FACILITIES OF INTERSTATE COMMERCE, TO REGULATE THE TRANSMISSION AND SALE OF ELECTRIC ENERGY AND NATURAL GAS IN INTERSTATE AND FOREIGN COMMERCE, AND FOR OTHER PURPOSES."

(February-March, 1935)

Testimony of *Commissioner Clyde L. Seavey* of the Federal Power Commission:

"Title II of H.R. 5423, introduced by Congressman Rayburn, is entitled 'Amendments to Federal Water Power Act.' By these amendments the present act is divided into three titles. It is provided that the present Federal Water Power Act shall constitute title I of the amended Federal Power Act. The Rayburn bill does not contain all of the sections of the present act. It includes (pp. 77 to 102) only those sections which it proposes to amend. None of these amendments to the present sections of the act is of major significance; they are made largely for the purpose of clarifying its effect in situations which have arisen in the course of its administration. A separate memorandum explaining these amendments is submitted herewith. The present analysis is devoted to the new titles which are added by the bill (pp. 103 to 141). Of these new provisions title II (pp. 103-122) contains the substantive provisions for the regulation of interstate electric utilities, and title III (pp. 122 to 141) brings together the provisions applicable to both water power licensees under title I and interstate operating companies under title II, including the general administrative and procedural sections."

(Page 384)

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"Mr. Wolverton: Did you participate in the drawing of this bill?

"Commissioner Seavey: Yes; I worked on it along with many others.

"Mr. Wolverton: Who were the others?

"Commissioner Seavey: They were the legal department, our legal department, and members of the Commission, and our engineers were consulted about certain practical phases; our accountant was consulted, and generally, so far as the Commission is concerned, we took in the whole staff of the Commission.

"Now, in addition to that, together we consulted the chairman of this committee, Mr. Rayburn; discussed the policies and the provisions of the bill, and also consulted the legislative counsel and Dr. Splawn. I do not know whether I can remember anybody else or not."

(Page 400)

Testimony of *Dozier DeVane,* Solicitor, Federal Power Commission:

"Mr. Wolverton: Who actually sat down and drafted that language? Do you know? You know in the drawing of any bill it finally comes down to one individual or two individuals, who actually express the policies and ideas by the use of words. Who did that as to article II?

* * * * *

"Mr. DeVane: Commissioner Seavey and myself, of the Federal Power Commission, were the two persons to whom the Commission delegated the responsibility for this work. I would like to say, however, that to neither of us belongs the credit, if we may call it credit, for the language that is in the bill, because we have had a great deal of assistance from members of the Commission and from members of its staff. This title has been worked over very seriously and very earnestly."

(Pages 552-553)

DRAFT OF FEDERAL POWER ACT AS INTRODUCED IN CONGRESS.

TITLE II. "AMENDMENTS TO FEDERAL WATER POWER ACT" (Amendments as proposed by Power Commission, indicated by italics).

"Section 201. Section 3 of the Federal Water Power Act is amended to read as follows:

* * * * *

"(13) 'net investment' in a project means the actual legitimate *prudent* original cost thereof * * *"

"Sec. 4. The Commission is hereby authorized and empowered—

* * * * *

"(b) To determine the actual legitimate *prudent* original cost of and the net investment in a licensed project, * * *"

(Pages 24-25, 452)

Note: The foregoing amendments were rejected by Congress

Comment: It is important to note that when Congress did intend to authorize the utilization of a rate base other than the rate base of "fair value," it did so in language directly, expressly and unmistakably declaring such policy. Thus in the *Federal Water Power Act of 1920 (41 Stat. 1063, 16 U.S.C. 791-823)*, "the valuation" of the property of any licensee "for purposes of rate making" *(Section 20)*, as well as for acquisition thereof by the Government *(Section 14)* is expressly limited to the "net investment" which is not "to exceed the fair value of the property taken" *(Section 14)*, as defined and limited to "actual legitimate original cost" *(Section 3 (13))*. Every license issued under the Act is "conditioned upon the acceptance by the licensee" of such rate base and valuation *(Section 6)*.

This is the only instance in which Congress has supplanted the principle of "fair value." It raised no constitutional obstacle, for if any person desired to avail himself of the license *privileges* of the *Water Power Act*, he *voluntarily* accepts at the outset the "terms and conditions" under which the United States is willing to permit the exercise of such privileges *(Alabama Power Co. v. Federal Power*

Comm., 128 F. (2d) 280, 287). This is both logical and just under the very special circumstances involved in the development of hydro-electric "projects" on the "public lands," "reservations" and "navigable waters" *(Section 3 (1), (2), (8))*, over all of which the United States exercises the prerogative of proprietorship as well as that of sovereignty *(Light v. United States*, 220 U. S. 523, 31 Sup. Ct. 485).

PART II. "REGULATIONS OF INTERSTATE ELECTRIC COMPANIES ENGAGED IN INTERSTATE COMMERCE."

Commission Draft of Bill:

"Ascertainment of Cost of Property.

"Sec. 211. (a) The Commission shall have power to ascertain for the purposes of this title and title III the actual legitimate prudent cost of the property of every public utility, and every fact which in its judgment may or does have any bearing on the determination of such cost.

"(b) The Commission may require any public utility to file with it an inventory of all or any part of the property of the utility and of the original cost thereof, including only those elements of cost that may be considered for purposes of determining just and reasonable rates under the provisions of this title and title III and the rules and regulations of the Commission. The Commission shall keep itself informed regarding the cost of all additions, betterments, extensions, and new construction of the property of every public utility.

"(c) In determining just and reasonable rates, the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question.

(Page 35)

Testimony of *Commissioner Seavey:*

"Section 211 authorizes the Commission to ascertain the actual prudent cost of the property of every public utility under its jurisdiction and to require the utilities to file inventories of their property and its cost. It directs the Commission to keep itself informed of the cost of all additions and betterments to utility property. And it provides that in determining just and reasonable rates, the Commission shall fix rates which will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question. Rate regulation must eventually be based on prudent investment. Recent decisions of the Supreme Court and the respect which the Court has always paid to the constitutional interpretations of the coordinate branches of the Government afford grounds for hope that this highly desirable result will be accomplished if the Congress should now definitely adopt the prudent cost rate base. This would present the case to the Court in a new light with a declaration of national policy that it has never had before."

"Section 301 authorizes the Commission to prescribe the forms of all accounts and records to be kept by licensees and public utilities and to inspect and examine the accounts and records so kept. This section is in substance the same as the provisions of the Interstate Commerce Act applicable for many years to telegraph and telephone companies and reenacted in the Communications Act passed by the last Congress. Such accounting control is essential to the compilation of a uniform body of information about the industry needed for the efficient administration of the act."

"Section 202 of the bill amends section 4 of the Water Power Act. This section consists of a general enumeration of the commission's powers. The present subsection (a) contains a reference to the commission's determination of the net investment of the licensee in a project, but the power to make such determination is left to implication and not expressly granted. While its power to do so has been upheld in a suit brought by the Clarion River Power Co. (59 Fed. (2d) 861, certiorari denied 287 U. S. 639), this amendment is designed to remove continued controversy on the subject. Subsection (a) is divided into two subsections, the second, lettered (b), containing the

grant of power 'to determine the actual legitimate prudent original cost' of a licensed project. The word 'prudent' is added here and consistently throughout the act as a qualification of the cost to be determined by the commission for purposes of recapture and rate making. The Water Power Act was the first congressional repudiation of the unstable 'fair value' rule; the net investment in the project is the sum to be paid on recapture and the amount to be used as a rate base. Consistent application of this theory requires the qualification that all costs allowed must have been prudently incurred. The commission interprets the present act in this way, but this interpretation has not been reviewed by the courts and the amendment is desired to eliminate the possibility of doubt on the subject."

"Mr. Wolverton. Speaking on the question of rates, throughout this bill, in different sections, there is this statement, or these words used:

Actual legitimate prudent original cost.

"Can you explain to me what those words mean?

"Commissioner Seavey. You are referring to—(Note—Water Power Act)

"Mr. Wolverton. Well, it occurs in section 202, subdivision (b), in order that you may have the exact wording, but it is used frequently in the bill.

"In other words, the Federal Power Commission is authorized to determine the actual legitimate prudent original cost.

"I am wondering why all of those terms are used, and whether one qualifies the other, or whether they are to be used in conjunction with one another. I have never observed that sort of a basis before.

"Commissioner Seavey. They are used as a composite. The present act contains all of those words except 'prudent'.

"Mr. Wolverton. Well, then, it ought to be very easy for you to explain to me what the meaning of it is, if the act already has it. What is the difference between actual and legitimate, or between legitimate and prudent?

"Commissioner Seavey. The actual cost of a property

might not be a legitimate cost, because of fraud or collusion, or other things that make it not a legitimate cost.

"Now, that is entirely different from actual cost.

"Mr. Wolverton. I can see how the Commission might be asked to pass upon and to determine a matter based upon actual cost, or legitimate cost, or prudent, or original cost, but when you get the combination together I am wondering what the net result will be.

"Commissioner Seavey. That combination, the actual effect is if they are legitimate; the actual cost if they are prudent.

"Mr. Wolverton. All right. You come to the word 'original' cost. Where does that fit into the picture?

"Commissioner Seavey. And, it must be the original cost of the facilities that are concerned. That is, the cost, the original cost, would be different than if some one later on after these facilities had been used or constructed came along and paid a price for them, and instead of using the price that may have been paid at some later date, this provision provides, and the present act provides, that the original cost of it shall be used.

"Mr. Wolverton. And, you say the word 'prudent' is something new?

"Commissioner Seavey. Yes.

"Mr. Wolverton. What is the reason for putting 'prudent' in?

"Commissioner Seavey. The word 'prudent' is put in there to clarify, to make positive, the interpretation that the Federal Power Commission has placed upon the present provisions, which do not include 'prudent.' They have put the interpretation that legitimate original actual cost means prudent cost, and have been proceeding on that theory.

"In order to remove any question about the interpretation of the Commission in the matter, this amendment is offered.

"Mr. Wolverton. I guess you have used enough words.

"Commissioner Seavey. I beg your pardon?

"Mr. Wolverton. There are enough words there, but as to clearness of meaning, I am not certain.

"Commissioner Seavey. This applies only to licensed projects which later on may be recovered by the Federal Government.

* * * * *

"Mr. Huddleston. Mr. Seavey may I direct your attention to the rule of rate making on page 117, subsection (c). (Note: Sec. 211)

"Commissioner Seavey. Yes.

"Mr. Huddleston. Where did that come from?

"Commissioner Seavey. Where did that come from?

"Mr. Huddleston. Where did you take that from?

"Commissioner Seavey. That approximately comes, not wholly from, and is the basis upon which the rates are fixed in California. There is added to these requirements which are not in the California statute, but which exist by administration, in the belief that they should be allowed a return upon a value controlled by the prudent cost of the property.

"Mr. Huddleston. There is nothing like this in the Federal (Water) Power Act.

"Commissioner Seavey. This, in a modified form, is now in the power act.

"Mr. Huddleston. Will you refer us to it?

"Commissioner Seavey. Sections 19 and 20 of the Federal (Water) Power Act.

"Mr. Huddleston. We do not have that before us here. Will you be kind enough to read it for the record?

"Commissioner Seavey. I will read those two sections. I do not know whether I can read out that part. Perhaps I shall read the whole section.

"Mr. Huddleston. Just the part, if you can, that prescribes the rule of rate making.

"Commissioner Seavey. Well, I will read the whole section: section 20 is as follows:

'Sec. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly

by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale or distribution or use in service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates for services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the Commission upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

'The administration of the provisions of this section, so far as applicable, shall be according to the practice and procedure in fixing and regulating the rates, charges, and practices of railroad companies as provided in the act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

'In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the Commission for any projects or projects under license in excess of the value or values prescribed in section 14 hereof for the purpose of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall

be claimed or allowed for the rights granted by the Commission or by this act.'

"Mr. Huddleston. That is very different from this provision or rule of rate making you have in subsection (c) here.

"Commissioner Seavey. Well—

"Mr. Huddleston. It is wholly and fundamentally different both in principle and in detail, is it not?

"Commissioner Seavey. Well, but it requires as a rate base approximately the same as is required here.

"Mr. Huddleston. May I venture to differ from your construction.

"This gives as a rule of rate making a single factor for consideration a fair return upon the actual legitimate prudent cost of the properties and so forth.

"Commissioner Seavey. Yes.

"Mr. Huddleston. That factor—

"Commissioner Seavey (interposing). It does not—

"Mr. Huddleston (continuing). That factor in the rule that you have read as now in force as section 20 of the power act is merely one among a number of factors to be considered.

"Commissioner Seavey. I would like to say that it does not exclude the use of other factors, but it limits, it limits the amount that the Commission may allow to a reasonable return upon the legitimate cost.

"Mr. Huddleston. The law that you have read.

"Commissioner Seavey. Yes.

"Mr. Huddleston. Again, I venture to differ from you.

"Commissioner Seavey. That is my interpretation, and not being an attorney—

"Mr. Huddleston (interposing). I am interested in this rule from two points of view: First, because I have very grave doubts as to its constitutionality on that. As you have said, that you are not a lawyer, and I will not interrogate you; but I am wondering whether you consider this a proper rule of rate making.

"Commissioner Seavey. I can only say this, as to its constitutionality—

"Mr. Huddleston (interposing). I do not want to discuss that with you, as you are not a lawyer. You would not help me, if you are not a lawyer, on that.

"Commissioner Seavey. I just want to refer you to the fact that the California commission in the Los Angeles Electric case, which went before the Supreme Court did fix a return upon the prudent historical cost and it was sustained, by the Supreme Court. There were other elements that went in, but that was the basis for the fixation of the rates.

"Mr. Huddleston. I accept your opinion for whatever it may be worth, as you are not a lawyer.

"Commissioner Seavey. I am fortunate not to be a lawyer, sometimes.

"Mr. Huddleston. It is dangerous to venture an opinion about something you have not made a study of.

"Now, I am interested in and the second point of interest to me is this, whether you consider this a proper rule of rate making. I will value your opinion on that.

"Commissioner Seavey. Yes; I do. I believe that investments in legitimate securities that are based upon the historical prudent cost of properties should be protected by a return upon that direct investment.

"Mr. Huddleston. And that is the only factor you think should be considered in making rates?

"Commissioner Seavey. Oh, there are many other things that are considered.

"Mr. Huddleston. You have not put them in this rule.

"Commissioner Seavey. No; I think it is not necessary to put them in there.

"Mr. Huddleston. You have confined the Commission, by this rule, to a single factor.

"Commissioner Seavey. That is true. That is true.

"Mr. Huddleston. They are not allowed to make rates at any more or any less than will yield a fair return upon the cost.

"Commissioner Seavey. The Commission would be

limited to allowing at least a fair return upon the cost; but that is on the lower limit; that is a minimum requirement.

"Mr. Huddleston. The rules do not say so. The rule says that the Commission shall accept whatever may be a fair return as the sole basis in fixing a rate. It does not allow anything on fair value, nor allow anything for depreciation, obsolence, and other factors of that kind.

"Commissioner Seavey. Let us see—not being a lawyer, I cannot read it and interpret it properly—but, let me read this:

> '(c) In determining just and reasonable rates, the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question.'

"That is a minimum requirement.

"Mr. Huddleston. Where do you get the word 'minimum'? That is not in here.

"Commissioner Seavey. Because that is what the language says.

"Mr. Huddleston. You have just as much authority to say that it is a 'maximum' as a 'minimum.' As a matter of fact, I think it is both minimum and maximum. It is absolute. It allows no latitude for variation. You must do this particular thing and nothing else.

"Commissioner Seavey. I would be gratified if your interpretation is right, because that is the way I believe it should be, but it was not my idea of the provision there that that was so limited.

* * * * *

"Mr. Huddleston. You are familiar with the rule of rate making as laid down in the leading case of *Smyth v. Ames*, I suppose?

"Commissioner Seavey. I have read it, but I do not want to express a legal opinion on it.

"Mr. Huddleston. That is all.

"Mr. Wolverton. Before we leave that, Mr. Commissioner, I would like to ask the question what do you consider prudent.

"Commissioner Seavey. What do I consider prudent?

"Mr. Wolverton. Yes.

"Commissioner Seavey. As a Commissioner, I would consider prudent—you mean of what a prudent cost might be? I would consider that it would be a sound judgment upon the facts that are presented for the consideration of the Commission that is sitting and passing upon what is a prudent cost.

"Mr. Wolverton. Would you judge whether a man had acted prudently or not by the conditions which prevail at the time the matter is before you for determination, or when he had exercised the judgment?

"Commissioner Seavey. No; it would have to be predicated upon the conditions that existed at the time that he made his judgment.

"Mr. Wolverton. That is helpful, because it would be very hard for some of us to qualify as prudent today, if judged by what we did a few years ago.

"Commissioner Seavey. Yes; it would be absolutely unfair and inequitable to try to determine the prudent cost of something that was built in 1920 upon 1935 conditions.

"Mr. Wolverton. The determination of the actual cost would be a very simple matter, would it not?

"Commissioner Seavey. Well, not so simple sometimes, but it is simple as compared with other determinations.

"Mr. Wolverton. I would assume that it is far easier to determine actual cost than it would be to determine prudent cost.

"Commissioner Seavey. Yes; it is.

"Mr. Wolverton. What do you mean by legitimate?

"Commissioner Seavey. I thought I made that plain.

"Mr. Wolverton. You did give an explanation.

"Commissioner Seavey. I would say that again—I think you are an attorney and I am not—

"Mr. Pettengill. He is a former prosecuting attorney.

"Commissioner Seavey. I believe legitimate as used in the present law comprehends a reasonable determina-

tion of a reasonable cost. That is, that it comprehends that a judgment shall be passed as to the reasonableness of the cost. Of course legitimate can be confined very specifically to a definition that you could make for it which might eliminate anything except a legal cost, that is, a cost that was not fraught with fraud or collusion; but I believe that the way that word is used in the Federal power act at the present time, taking into consideration all of the provisions of the act, that it does comprehend that a reasonable cost should be determined and that legitimate has a broader meaning than what it might be confined to if you used a restrictive definition.

"Mr. Wolverton. For that reason I asked you what the term 'legitimate' meant.

"Commissioner Seavey. Yes.

"Mr. Wolverton. I wish to know whether it has a legal significance, or whether it has a broader significance than you have indicated.

"Commissioner Seavey. I think it has a broader and I am sorry I misunderstood your first question.

"Mr. Wolverton. Upon the basis that you have defined legitimate, what is the difference between 'legitimate' and 'prudent'?

"Commissioner Seavey. I do not believe there is very much, but in order to make it sure, we wanted to include that word 'prudent' in the definition.

"Mr. Wolverton. If you are very anxious to make it sure, I would suggest that you use that embellishment that has so recently come into use 'and/or'. I have never quite understood what it meant, if you miss anything then it is covered by that.

"Commissioner Seavey. Well, I do not like those two words either, and neither does the Commission, I guess, and neither did those who drafted the original Water Power Act, so they are running them all together as a composite picture of what they want to accomplish.

"Mr. Wolverton. In this definition, in section 211, the words used are 'actual legitimate prudent cost of the property.'

"Commissioner Seavey. Yes.

"Mr. Wolverton. In the section to which I directed

your attention the word 'original' is used after 'prudent.'

"Why was it used in one place and not in the other?

"Commissioner Seavey. Now, let me get your question. You are referring to—

"Mr. Wolverton. I think it was section 294 to which I first made reference.

"Commissioner Seavey. Oh, one is the water power, the present Water Power Act, and amendments to it, and the other is the regulatory act.

"Mr. Wolverton. Then you feel that there was a purpose in leaving out the word 'original' in one instance?

"Commissioner Seavey. Yes.

"Mr. Wolverton. What was the purpose in leaving it out?

"Commissioner Seavey. Leaving out 'original'?

"Mr. Wolverton. Yes. You understand what I mean. The first section to which I called your attention used 'actual legitimate prudent original cost.'

"Commissioner Seavey. Yes.

"Mr. Wolverton. Now, this other section uses the words 'actual legitimate prudent' and you have directed my attention to the fact that there is a difference in the application of the two sections. For that reason I am asking what is the difference that requires the use of 'original' in one instance and not in the other?

"Commissioner Seavey. You wish to know why in the Federal Water Power Act proper 'original' was used and in the regulatory act 'original' is not used.

"Mr. Wolverton. Yes.

"Commissioner Seavey. Now, from a regulatory standpoint, we do not believe that it is necessary to have that limitation of 'original', because sometimes it is almost impossible to find original cost. Under the water power act the original cost is under the immediate direction of a commission. That is, the construction is made through a license issued, and the contract is made so that so far as the original cost is concerned, that can be determined; but in regulatory matters some of these utilities go back for years. You cannot determine the

original costs and I am not sure that you wish to determine them, if a legitimate prudent price was paid for the property.

"Mr. Wolverton. Well, that confirms what I have had in my mind, actual and original does not mean much from the standpoint which you have given because legitimate and prudent overshadows 'actual or original cost.'

"Commissioner Seavey. It might; there is no question about that.

"Mr. Wolverton. I am inclined to think it would, from the way you look at it.

"Commissioner Seavey. I think it should; I think it would; yes.

"Mr. Wolverton. So from the standpoint of this bill in fixing the basis of rates, we could leave out 'actual' and 'original', and under your theory just let it be determined by legitimate and prudent?

"Commissioner Seavey. Legitimate prudent cost; yes.

"Mr. Wolverton. So the words 'actual' and 'original' are just surplusage.

"Commissioner Seavey. I do not think 'actual' in the new matter there has added very much to it, because that would be controlled—

"Mr. Wolverton (interposing). I do not think it does either, under the view you have expressed.

"Commissioner Seavey. I agree with you."

(Pages 386, 388, 399-400, 411-414, 414-416)

Testimony of *Solicitor DeVane*, Federal Power Commission:

"Mr. DeVane. The next amendment will be found on page 5—I beg your pardon—on page 4, under paragraph No. 13. (Note: Water Power Act.)

'(13) "net investment" in a project means the actual legitimate prudent original cost thereof.'

"The word 'prudent' is the new word in that subsection.

"Mr. Pettengill. Is there court authority for that word?

"Mr. DeVane. How is that, sir?

"Mr. Pettengill. Is there court authority for putting that word in?

"Mr. DeVane. Well, we have court authority to the extent that the word has been defined; yes, sir.

"Mr. Pettengill. Well, what does it add to the meaning of the law as it now exists?

"Mr. DeVane. It adds this to the act: The experience of the Commission has shown that in hearings to determine the cost of licensed projects the position is frequently taken that under the definition as used in the act as it is today, the Commission can exercise no control over the expenditures made, no matter how imprudent they are, if the licensee can prove that the expenditures were actually made, and we are unable to show fraud or collusion.

"Now, I might say that the Commission has held to the contrary. The Commission insofar as present licensees are concerned, has already held that expenditures that were improperly made could be disallowed and that it was not necessary to show fraud or collusion in order to disallow them.

"The purpose of this amendment is to stop the licensees from continuing to make that contention in future cases. This amendment, of course, can have no effect upon licenses that have already been issued.

* * * * *

"Mr. DeVane. I endeavored to show on yesterday, how this act would be a complement to State regulations of local rates. I call the committee's attention to section 211 page 116 of the bill, in which the Commission is given the authority to ascertain for the purpose of this title, and title III of title II, the actual legitimate prudent cost of properties of every public utility subject to its jurisdiction. Then I mentioned paragraph (b) of that section, which is merely procedural and gives the Commission access to information for the determination of such costs; and then I was right at the point of asking the committee to permit me to postpone any discussion of subsection (c) of that section at that time—

"Mr. Bulwinkle. You mean subsection (c)?

"Mr. DeVane. Subsection (c) of that section, at this time, because that relates to the powers of this Com-

mission in connection with the fixing of rates and what I am trying to do at this time, before I discuss those matters, is to get clearly before the committee the plan of this bill.

"When I have done that, I think we can discuss these legal questions that you may ask me, with a little better understanding.

* * * * * *

"Mr. DeVane. Yes; in connection with that, may I refer to section 211 (c), on page 117; section 211 (c).

"I think probably I should refer to section 211 in its entirety, but particularly I want to address a few remarks to 211 (c).

"Section 211 authorizes the Commission to ascertain the actual prudent cost of the property of every public utility under its jurisdiction and to require the utilities to file inventories of their property and its cost. It directs the Commission to keep itself informed of the cost of all additions and betterments to utility property. And it provides that in determining just and reasonable rates, the Commission shall fix rates which will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question. Rate regulation must eventually be based on prudent investment. Recent decisions of the Supreme Court and the respect which the Court has always paid to the constitutional interpretations of the coordinate branches of the government afford grounds for hope that this highly desirable result will be accomplished if the Congress should now definitely adopt the prudent cost rate base. This would present the case to the Court in a new light with a declaration of national policy that it has never had before.

"Now, I direct your attention to the provisions of section 202 which is merely declaratory of the common-law principle that rates shall be just and reasonable. I directed your attention to 211 (a) this morning as being complementary to State regulation. Section 211 (a) will secure a body of information, which I think is most valuable in the administration of this act and as an aid to the State commissions in their regulation of consumers.

"Section 211 (c) provides that in determining just and reasonable rates—I wish to call attention to the way this section is drawn, and to state it has been drawn in this

manner to make sure, as we believe, of its constitutionality. 'In determining just and reasonable rates the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question.'

"You will observe the section does not say that the Commission shall allow a fair return upon the prudent cost of the property, nothing more or less, but in determining just and reasonable rates, the rates fixed shall be such as will allow a fair return upon the actual legitimate prudent cost.

"The Commission allows what is a fair return, and it cannot go below that, could not fix rates that would allow less than a fair return upon the actual legitimate prudent cost of the property.

* * * * *

"Mr. Wolverton. What will be the net result, the difference in fixing the rate upon a basis of the 'actual legitimate prudent original cost,' as compared with the rate fixed on the 'fair value of the property'?

"Mr. DeVane. What is the advantage—

"Mr. Wolverton (interposing). What will the net result or difference be?

"Mr. DeVane. I cannot say what the result will be.

"Mr. Wolverton. Do you anticipate that it will be a higher rate or a lower rate?

"Mr. DeVane. I anticipate that it will make for lower rates, yes.

"Mr. Wolverton. Notwithstanding the fact that the securities of the companies have all been issued on the basis of rates fixed on a fair valuation of the property?

"Mr. DeVane. No; I do not admit that as a fact; I do not think that securities have been issued on the basis of the fair value of the property. I think in a great many cases you will find securities far exceed the fair value of the property, and I think in other cases you will find that the securities are considerably less.

In theory of the law the amount of securities outstanding has nothing to do with rates, because in fixing the rate you are supposed to disregard the securities.

"Mr. Wolverton. Would the use of the term 'fair value' which has a very definite meaning, as the result of construction by many courts, including the Supreme Court of the United States, preclude the Federal Power Commission from doing the very thing that is to be accomplished—you are supposed to do—by the use of the four words, 'actual legitimate prudent original'?

"Mr. DeVane. Would it preclude them from reaching the same result?

"Mr. Wolverton. Yes.

"Mr. DeVane. In rate cases?

"Mr. Wolverton. Yes.

"Mr. DeVane. No, it would not preclude them from doing it.

"Mr. Wolverton. Then why the necessity for changing the words which are commonly used if the Commission can arrive at the same result by using a term which has had the court's construction?

"Mr. DeVane. I am glad you asked that question, Mr. Wolverton. If you directed the Commission to determine rates on the fair value of the property it would mean that in each one of these rate cases it would be necessary to employ a good many people; it would be necessary for the Commission to spend thousands of dollars; it would impose upon the operating company the necessity of spending $2 to $5 to each one the Commission spent in determining the fair value, and when you got through, in my opinion, you would not have reached a materially different result from that which would be reached in this way. Rates can be determined in this manner at a minimum cost to everyone. After the first determination of the money that is prudently invested in any property, rate investigations will not cost five cents the dollar that is now spent under the present method of fixing rates.

"Mr. Wolverton. Would it not be just as costly to determine what was the actual legitimate prudent original cost as it would be to determine what was the fair value?

"Mr. DeVane. No. And the difference is this: The determination of cost is made once, and it continues thereafter as a fact. The determination of values, as the utilities can show to you is a shifting thing; it is never still; it is never permanent; it is one thing this year and

it is something else another year; it requires a determination to be made in every rate case; what is done in one rate case is thrown out of the window in the next rate case.".

(Pages 461-462, 518, 572-573, 573-575)

APPENDIX B.

COMPOSITE OF SECTION 208 (ORIGINALLY NUMBERED 211) OF THE FEDERAL POWER ACT AS PROPOSED BY THE POWER COMMISSION AND AS ENACTED BY CONGRESS.

The *italicized* language, together with the language of the text, *not stricken,* constitutes the section of the Act in question, *as enacted by Congress.*

The *italicized* language, together with the language of the text *as stricken,* constitutes the section as drafted by the Federal Power Commission, submitted by it to Congress, with extensive supporting discussion, *but rejected by Congress.*

(a) *The Commission* ~~shall have power to ascertain for the purposes of this title and title III~~ may investigate and ascertain *the actual legitimate* ~~prudent~~ *cost of the property of every public utility,* the depreciation therein, and when found necessary for rate-making purposes, ~~and every fact which in its judgment may or does have any bearing~~ other facts which bear *on the determination of such cost* or depreciation, and the fair value of such property.

(b) ~~The Commission may require any~~ every *public utility* upon request shall ~~to~~ *file* ~~with it~~ with the Commission *an inventory of all or any part of* ~~the~~ its *property* ~~of the utility~~ and a statement of the original cost thereof, ~~including only those elements of cost that may be considered for purposes of determining just and reasonable rates under the provisions of this title and title III and the rules and regulations of the Commission. The Commission~~ and *shall keep* ~~itself~~ the Commission *informed regarding the cost of all additions, betterments, extensions, and new construction* of the property of every public utility.

(c) ~~In determining just and reasonable rates, the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question.~~

APPENDIX C.

75th Congress, 1st Session.

Calendar No. 1210. Senate Report No. 1162.

INTERSTATE TRANSPORTATION AND SALE OF NATURAL GAS.

August 9 (calendar day, Aug. 11), 1937.
Ordered to be Printed.

Mr. Wheeler, from the Committee on Interstate Commerce, submitted the following

REPORT

[To accompany H. R. 6586]

The Committee on Interstate Commerce, to whom was referred the bill (H. R. 6586) to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes, having considered the same, report thereon with a recommendation that it pass without amendment.

Report No. 709 on the bill (H. R. 6586) explains well and analyzes thoroughly the bill. The Committee on Interstate Commerce feel there is nothing they wish to add to this report which for the benefit of the Senate is herewith appended.

[H. Rept. No. 709, 75th Cong., 1st sess.]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 6586) to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes, having considered the same, report thereon with a recommendation that it pass.

It was originally introduced as H. R. 4008.

General Purposes of the Bill.

The bill is substantially identical with H. R. 12680 which, as amended, was reported by the Committee on Interstate and Foreign Commerce of the Seventy-fourth Congress, second session, with a recommendation that it pass. If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting

and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.* (1927) 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.

In 1934 24 States produced natural gas, and 35 States consumed it. The annual sale of natural gas in that year amounted to 1,764,988,000,000 cubic feet. The sale of this gas brought a revenue of $394,000,000. Of this amount, about $260,000,000 was in payment for gas transported in interstate commerce. During 1935 there was some increase in the pipe-line mileage and in the transportation of natural gas in interstate commerce.

The average price per thousand cubic feet for domestic use was 74.6 cents; for commercial use, 49.6 cents; and for all other industrial uses, 16.9 cents. This gas was consumed by 7,600,000 customers.

There are today substantially in excess of 50,000 miles of gas pipe lines in the United States. While natural gas has been in use for 50 years or more in this country, and while there was some transportation in interstate commerce prior to 1926, the substantial development in the industry has occurred since that year.

The bill provides for regulation of the exportation and importation of natural gas and authorizes the Commission to ascertain the cost of property used in rendering service; to direct extension or improvement of transportation facilities, and require the interconnection of facilities; to regulate the abandonment of service; to prescribe a uniform system of accounts; to determine proper depreciation rates; to fix rates and charges for natural gas sold for resale for ultimate public consumption; to investigate compacts between the States; to compile information relative to the effect and operation of any compacts between the States; and to make investigations and report to Congress respecting the natural-gas industry. The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority, and contains provisions for cooperative action with State regulatory bodies. Mr. John E. Benton, general solicitor of the National Association of Railroad and Utilities Commissioners, and other representatives of State commissions and municipalities, appeared at the hearing before the committee in support of the bill.

The general attitude of the State regulatory commissions was indicated in a communication from Mr. Benton to the chairman, House Interstate and Foreign Commerce Committee, under date of March 29, 1937, enclosing a copy of a resolution adopted by the executive committee of the National Association of Railroad and Utilities Commissioners on March 26, 1937, as follows:

National Association of Railroad and Utilities Commissioners,

Washington, D. C., March 29, 1937.

Hon. Clarence F. Lea, Chairman, House Interstate and Foreign Commerce Committee, Washington, D. C.

Dear Sir: A joint meeting of the executive committee of this association and of the association's committee on legislation was held on March 26, 1937, for the consideration of legislative matters.

The provisions of H. R. 4008 were considered for the purpose of determining whether that bill will provide regulation of the character requested in the resolution heretofore adopted by this association, and presented at the hearing on March 24, 1936. Consideration was also given to the situation existing in Illinois, where the Illinois Com-

mission finds itself impeded by injunction proceedings in the Federal courts in its undertaking to discover what it costs the interstate pipe-line company to deliver gas in Illinois, although the commission is seeking that information only for the purpose of determining what the reasonable expenses of the local distributing company ought to be, and what price for gas sold in the Chicago areas should be approved by the commission as just and reasonable.

A resolution was unanimously adopted endorsing H. R. 4008, amended as requested on behalf of this association at the hearing on March 24. I attach a copy of the resolution hereto, and ask that it be printed as if presented at the hearing.

Yours very truly,

JOHN E. BENTON, General Solicitor.

"Resolution Adopted by the Executive Committee of the National Association of Railroad and Utilities Commissioners on March 26, 1937.

"*Resolved by the executive committee of the National Association of Railroad and Utilities Commissioners,* That the position of said association declared by resolution at its forty-seventh annual convention, in favor of the enactment of Federal legislation providing for the regulation of the interstate transmission and sale of gas at wholesale for resale is hereby reaffirmed; and

"*Resolved further,* That for the purpose of providing such regulations said association endorses H. R. 4008, an act to regulate the transportation and sale of natural gas in interstate commerce, introduced by Congressman Lea, of California, with the amendments proposed thereto at the hearing before the House Interstate and Foreign Commerce Committee on behalf of the association on March 24, 1937; and

"*Resolved further,* That the necessity for such regulation is increasingly imperative, and that the enactment of H. R. 4008, amended as proposed, at the present session of Congress is earnestly urged on behalf of said association."

The bill provides for regulation along recognized and more or less standardized lines. There is nothing novel in

its provisions, and it is believed that no constitutional question is presented.

Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions.

In view of the importance of section 1 (b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows: "but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however, unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. That part of the negative declaration stating that the act shall not apply to "the local distribution of natural gas" is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.

It was urged in connection with earlier bills that there should be inserted at the end of this subsection a proviso as follows:

"*Provided*, That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally."

In order to avoid misunderstanding the committee thought it necessary to omit this proviso from the present bill for the following reasons, even though there is entire agreement with the intended policy which would have prompted its inclusion: First, it would have been surplusage if interpreted as it was intended to be interpreted, and, second, it would have been, in all likelihood, a source of confusion if in-

terpreted in any other way. For example, it was felt that in the effort to find a reason for its inclusion it might have been argued that it exempted sales to a publicly owned distributing company, and such an exemption is not, of course, intended. It is believed that the purposes of this proviso, assuming the need for any such provision, are fully covered in the present provision by the language—"but shall not apply to any other * * * sales of natural gas."

Sectional Analysis of the Bill.

Section 1. Necessity for Regulation of Natural-Gas Companies.

Subsection (a) contains a declaration of policy, states the necessity for Federal regulation, and defines the scope of that regulation. The subsection declares that the business of transporting and selling natural gas in interstate and foreign commerce for ultimate distribution to the public is affected with a public interest.

Subsection (b) confers jurisdiction upon the Commission over the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.

Section 2. Definitions.

This section contains definitions of (1) "person", (2) "corporation", (3) "municipality", (4) "State", (5) "natural gas", (6) "natural-gas company", (7) "interstate commerce", (8) "State commission", and (9) "Commission" and "Commissioner". The definitions as they appear are self-explanatory and necessary to the proper administration of the bill.

Section 3. Exportation or Importation of Natural Gas.

This section provides that after 6 months from the date of enactment no person may export or import natural gas without express approval of the Commission, such approval to be granted unless such exportation or importation will not be consistent with the public interest.

Section 4. Rates and Charges; Schedules; Suspensions of New Rates.

Subsection (a) imposes upon natural-gas companies the duty of charging just and reasonable rates; and, under the

provisions of subsection (b), undue preferences or advantages are prohibited.

Subsection (c) requires the filing of schedules and contracts relating to all rates and charges subject to the jurisdiction of the Commission; and, under the provisions of subsection (d), no change may be made in such rates except after 30 days' notice.

Subsection (e) authorizes the Commission to hold hearings concerning the lawfulness of any proposed change in rates, and to suspend such rates for not over 5 months, pending such hearing. If the Commission investigation has not been completed before the rates go into effect, the Commission may require the natural-gas company to make refunds if the increase is not approved; and it is provided that adequate bond be furnished to that end. The burden of proof is placed upon the natural-gas company to justify any increase in rates, and the hearing and decision of such matters is given preference over other matters pending before the Commission.

Section 5. Fixing Rates and Charges; Determination of Cost of Production or Transportation.

Subsection (a) authorizes the Commission, after a hearing initiated by it, or upon complaint, to fix charges and reasonable rates for any transportation or sale subject to its jurisdiction.

Subsection (b) authorizes the Commission upon its own motion, or upon the request of a State commission, to investigate and determine the cost of production or transportation of natural gas in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. This subsection applies only to cases involving transportation of natural gas in interstate commerce and will greatly aid State commissions in their rate-making proceedings.

Section 6. Ascertainment of Cost of Property.

Subsection (a) authorizes the Commission to investigate and ascertain the actual legitimate cost of property, depreciation, and other necessary facts for rate-making purposes.

Subsection (b) requires every natural-gas company upon request to file with the Commission an inventory of its

property, and a statement of the original cost thereof, and to keep the Commission informed regarding additions, betterments, extensions, and new construction.

Section 7. Extension of Facilities; Abandonment of Service.

Subsection (a) authorizes the Commission to direct a natural-gas company to extend or improve its facilities, and to establish physical connection and sell natural gas to any person or municipality engaged, or legally authorized to engage, in the local distribution of natural or artificial gas to the public, upon a finding that such an action is necessary or desirable in the public interest, but does not give the Commission authority to compel such extension or establishment of physical connection when to do so would impair the ability of the natural-gas company to render adequate service to its existing customers or involve the enlargement of transportation facilities.

Subsection (b) requires approval of the Commission by any natural gas company desirous of abandoning any or all of its facilities subject to the jurisdiction of the Commission. The Commission is authorized to approve such abandonment if it finds that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted or that the present or future public convenience or necessity permits such abandonment.

Subsection (c) provides that no natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being serviced by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market without a certificate of public convenience and necessity from the Commission. There is a proviso that a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying the increased market demands in the territory in which it operates. There are similar provisions requiring certificates of public convenience and necessity for extensions of service in the Interstate Commerce Act (U. S. C., 1934, title 49, sec. 1 (18-20); the Communications Act of 1934 (U. S. C., 1934, title 47, sec. 214), and the Motor Carriers Act (U. S. C., 1934, title 49, secs. 306, 307, 308).

Section 8. Accounts, Records, and Memoranda.

Subsection (a) requires natural-gas companies to make and keep such accounts, records, and memoranda as the Commission may direct. However, natural-gas companies are not relieved by this subsection from the duty of keeping such accounts as may be prescribed under the laws of any State.

Subsection (b) authorizes the Commission to inspect and examine accounts, records, and memoranda of natural-gas companies and to have access to the premises of such companies when necessary for that purpose.

Subsection (c) subjects the accounts of any person who controls, directly or indirectly, a natural-gas company, subject to the Commission's jurisdiction, to examination by the Commission.

Section 9. Rates of Depreciation.

The Commission is authorized to require proper depreciation accounting and to determine and fix adequate depreciation rates, such rates to include amortization. The depreciation charges which a State commission may fix for rate purposes would not be affected by this section.

Subsection (b) requires the Commission to receive and consider the views of State commissions before prescribing depreciation rates.

Section 10. Periodic and Special Reports.

The Commission by this section is authorized to require periodic and special reports which may be necessary for the proper administration of the act, and prescribe the manner and form in which the reports shall be made. It is declared to be unlawful for any person willfully to hinder or obstruct the making or filing of any information, report, or account required to be made, filed, or kept by the Commission.

Section 11. State Compacts; Reports On.

Subsection (a) imposes the duty upon the Commission to assemble pertinent information with reference to the subject matter of any proposed compacts between two or more States, and requires the Commission to make such information public and report the same to the Congress, together with such recommendations for further legislation as appear to be appropriate or necessary to carry out the

purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States.

Subsection (b) requires the Commission to assemble and keep current pertinent information with respect to the effect and operation of any compact between the States heretofore or hereafter approved by the Congress, and to make such information public and report to the Congress and make such legislative recommendations as are appropriate to promote the purposes of such compact.

Subsection (c) authorizes the Commission to avail itself of the services, records, and information of the various departments and agencies of the Government, and authorizes the President to direct that such services and facilities of such agencies be made available to the Commission.

Section 12. Officials Dealing in Securities.

This section makes unlawful personal profit by an official or a director of a natural-gas company through the negotiation, hypothecation, or sale of any security issue by any such company.

Section 13. Complaints.

Under this section any State, municipality, or State commission may complain to the Commission of anything done or omitted to be done by any natural-gas company in contravention of the provisions of the bill.

Section 14. Investigations by Commission; Attendance of Witnesses; Depositions.

The Commission is authorized by subsection (a) to investigate any violation of the provisions of the Natural Gas Act, and may make available to State commissions and municipalities any information concerning the matters to which the bill relates.

Subsection (b) provides that the Commission may, after a hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company or by anyone on its behalf, including its owned or leased properties or royalty contracts, and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus, of all delay rentals or other forms of rental or compensation for unoperated lands and leases.

Subsections (c) and (d) provide for the issuance of subpenas and the attendance of witnesses, and in the event of refusal to attend or produce books or records, the Commission is given recourse to the courts. A willful failure to attend as a witness or to produce books or records is made a misdemeanor, punishable by fine of not more than $1,000 or imprisonment of not more than 1 year, or both.

Subsections (e), (f), and (g) authorize the taking of testimony by deposition, either in the United States or in a foreign country. Witnesses before the Commission and witnesses giving depositions as well as the person taking the deposition are entitled to the same fees as are paid for like services in the courts of the United States.

No person is excused from giving testimony because it may be self-incriminating, but under subsection (h) the person so testifying may not thereafter be subject to any penalty or forfeiture for or on account of any transaction or thing concerning which he is compelled to testify or to produce evidence. This exemption does not, however, relieve a party from prosecution for perjury.

Section 15. Hearings; Rules of Procedure.

Subsection (a) provides that hearings under the Natural Gas Act may be held before the Commission or any member or representative designated by the Commission. It authorizes the Commission to admit as a party to any proceeding any interested State, State commission, municipality, or private party in accordance with such rules and regulations as the Commission may prescribe.

Subsection (b) authorizes the Commission to adopt rules of practice and procedure governing all its hearings and proceedings. It provides also that no informality in any proceeding shall invalidate an order or regulation issued under the authority of the act.

Section 16. Administrative Powers of Commission; Rules, Regulations, and Orders.

This section contains a general grant of administrative powers to perform necessary acts, issue orders, rules, and regulations and prescribe the form of documents to be filed with the Commission.

Section 17. Use of Joint Boards; Cooperation with State Commissions.

Subsection (a) provides that the Commission may refer any matter arising in the administration of the act to a board to be composed of a member or members from the State or each of the States affected or to be affected by such matter.

Subsection (b) authorizes the Commission to confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications and regulations of natural-gas companies, and to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act.

Subsection (c) provides that the Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies, and further provides that the Commission may, when it can do so without prejudice to the efficient and proper conduct of its affairs, make available to a State commission, upon request, any of its trained rate, valuation, or other experts, as witnesses subject to reimbursement of their compensation and traveling expenses.

Section 18. Appointment of Officers and Employees.

This section authorizes the Commission to appoint experts without regard to civil-service laws and other employees subject to the civil-service laws, and to fix salaries in accordance with the Classification Act of 1923.

Section 19. Rehearings; Court Review of Orders.

Subsection (a) authorizes parties to a proceeding before the Commission to apply for a rehearing within 30 days after the issuance of an order by which such party is aggrieved. The Commission is given power to abrogate or modify its order upon such application. Unless it acts upon the application within 30 days, the application may be deemed to have been denied. No proceeding for court review of an order of the Commission is to be brought unless an application for rehearing shall have been filed.

Subsection (b) provides for review of the Commission's orders by the circuit courts of appeals and the Court of Appeals of the District of Columbia. No objection to any order is to be considered by the court unless it was urged before the Commission in the application for rehearing.

unless there was reasonable ground for failure to raise it on the application. Findings of the Commission as to the facts, if supported by substantial evidence, are made conclusive, but the court may upon application order additional evidence to be taken before the Commission. The judgment of the court is subject to review by the Supreme Court of the United States upon certiorari or certification.

Section 20. Enforcement of Act; Regulations; and Orders

This section authorizes the Commission to bring a civil action in the proper district court to enjoin acts or practices in violation of the act or any rule, regulation, or order thereunder and to enforce compliance therewith.

Subsection (b) confers upon the courts of the United States jurisdiction to issue writs of mandamus commanding compliance with the act and rules, regulations, or orders thereunder.

Subsection (c) authorizes the Commission to employ such attorneys as it needs for its legal work.

Section 21. General Penalties.

Subsection (a) imposes a criminal penalty of fine, imprisonment, or both upon any person who willfully and knowingly violates the provisions of the act.

Subsection (b) provides for a fine for violations of the rules, regulations, and orders issued under authority of the act.

Section 22. Jurisdiction of Offenses; Enforcement of Liabilities and Duties.

This section imposes appropriate jurisdiction upon the courts of the United States over cases arising under the act.

Section 23. Separability of Provisions.

This is the usual separability section saving the rest of the act in case of a decision holding any part invalid.

Section 24. Short Title.

The act may be cited as the "Natural Gas Act".

(Emphasis added.)

APPENDIX D.

COMMENT UPON AND ANALYSIS OF VARIANT POSITIONS AND CONTENTIONS OF FEDERAL POWER COMMISSION WITH RESPECT TO THE PRINCIPLE OF "FAIR VALUE" AS THE RATE BASE OF ELECTRIC AND GAS UTILITIES.

During the eight-year period from the effective date of the Federal Power Act (August 26, 1935) and the effective date of the Natural Gas Act (June 21, 1938) to the present time, the Federal Power Commission has taken various and divergent positions in its decisions, reports, briefs and other public announcements, as to the proper and lawful rate base of those utilities over which it has rate-regulatory control under the Federal Power Act and the Natural Gas Act. The eight-year period, under the circumstances, divides itself into three shorter intervals, to-wit: (A) Years 1935-1940, (B) Year 1940, and (C) Years 1941-1943.

(A) YEARS 1935-1940.

During this period the Power Commission accepted the principle of "fair value" as controlling, and made no contention that Congress, either in the Federal Power Act or in the Natural Gas Act, abrogated the principle of "fair value" or established, or authorized the Commission to establish, the so-called "actual legitimate prudent cost" rate base. This is evident from the following:

(1) The Commission, reporting for the year 1935, declares:

> "The Public Utility Act of 1935 deals with a twofold problem. In title I of the new statute the Congress has asserted its jurisdiction over the financial structure and practices of holding-company systems with a view to the elimination of the economic burdens which holding-company control had placed upon local operating utilities. In title II the Congress has established regulatory control over the interstate activities of electric utilities which were beyond the constitutional or effective administrative control of the States, and has set up machinery for Federal assistance to State regulatory bodies in their efforts to accomplish effective public regulation.
>
> "*New Powers Conferred Upon the Commission.*"
>
> "The authority to fix rates over that part of interstate energy which is sold wholesale for resale is one of the

powers conferred by title II upon the Commission. This power was held to be beyond the authority of the States by the United States Supreme Court in *Public Utilities Commission v. Attleboro Company,* 273 U. S. 83. The object of this provision is to insure reasonable wholesale rates and to prevent interstate companies from discriminating in favor of consumers of one State at the expense of consumers of another State. The act does not give the Federal Commission any authority over local rates for electric service, this function being reserved exclusively to the States."

Annual Report, 1935, Federal Power Commission, pp. 1-2.

(2) The Commission, reporting for the year 1937, states:

"Prudent Investment Rule in Rate-Making Urged Upon the Supreme Court."

"During the past generation the growth of public utility operations has raised complex administrative problems not the least of which has been the evolution of an adequate workable rule for fixing some base upon which to predicate fair rates of return that would insure financial stability to operating companies and provide consumers with efficient service at reasonable rates. The fact that no adequate and workable rule has been evolved has been due in large part to an interpretation placed by the Supreme Court upon the fair value of utility property for rate-making purposes, in a line of decisions starting with the case of *Smyth v. Ames,* decided in 1898.

"As this issue, important alike to this Commission and to State regulatory agencies throughout the country, was involved in the case of *Railroad Commission of the State of California v. Pacific Gas and Electric Company,* pending before the United States Supreme Court, the Federal Power Commission, by leave of the Court, was permitted to file a brief *amicus curiae,* and its general counsel to appear in oral argument when the case was heard on November 11, 1937.

"This Commission entered the case for the purpose of defending the constitutionality of the prudent investment principle and to urge that the Court reverse the doctrine of *Smyth v. Ames,* adopted 39 years ago, *which requires consideration of reproduction cost as an element in de-*

termining the fair present value of utility property for rate-making purposes.

* * * * *

"Under the Federal Water Power Act of 1920 public utility companies securing license *were required to consent* to the use of net investment (the statutory equivalent for prudent investment) in the licensed project as a rate base in those situations in which the Commission could prescribe rates. The amendment of 1935 placing under the jurisdiction of the Commission interstate electric utilities did not expressly prescribe prudent investment as the base for rate-making purposes, but if the Supreme Court should approve as constitutional the theory of rate making for which the Commission is contending, the language of the amendment of 1935 would be sufficiently broad to enable the Commission to apply the prudent investment rule in fixing those rates which it is authorized to regulate.

"The Commission pointed out that since the Commission is standing on the threshold of a new era of Federal regulation involving an industry which for the first time has been subjected to the regulatory power of the Congress and is faced with the important function of rate making, it is deeply concerned in the establishment of a legal principle which will be consistent with and not obstructive to a sound administration of the rate-making power.

"The position taken by the Commission is that *if it is to be required under the Constitution, in fixing electrical rates to consider reproduction cost as an essential element in the determination of a rate base,* its administrative task will be well-nigh impossible of performance. It expressed the belief that a sound basis—sound in administration, in economics, and in law—upon which the public utility properties should be valued for rate-making purposes is the prudent investment in those properties, and that such a basis is entirely consistent with the requirements of the 5th and 14th Amendments of the Constitution.

"It was urged upon the Supreme Court that the rule of *Smyth v. Ames,* however much it may have been justified when applied to the facts of another generation, has no

justification in economics or in law when applied to the realities of the present day." (Emphasis ours.)

Annual Report, 1937, Federal Power Commission, pp. 10-11.

(3) The Commission, reporting for the year 1938, says:

"The decision of the Supreme Court in the case of *Railroad Commission of the State of California v. The Pacific Gas and Electric Co.*, in which the Commission filed a brief *amicus curiae*, and its general counsel participated in oral argument, adopted the view which the Commission had urged upon the Court that the Railroad Commission of California, in refusing to give any probative weight to evidence of reproduction cost in determining the proper rate base, had not deprived the Pacific Gas and Electric Co. of due process of law. The Supreme Court remanded the case to the District Court with instructions to make findings as to whether the rate fixed by the State Commission resulted in confiscation of the company's property. It is extremely significant that upon remand the District Court held that the rate base fixed by the Railroad Commission of California, without giving effect to evidence of reproduction cost of the company's properties, was a proper basis upon which to permit the company a reasonable rate of return."

Annual Report, 1938, Federal Power Commission, pp. 30-31.

(4) The Commission in its decision in case of *City of Los Angeles v. Nevada-California Electric Corp.*, Jan. 25, 1940, 32 P.U.R. (n.s.) 193, in determining a rate base and fixing the rates of the corporation therein involved, *did not declare, and so obviously had not then discovered, as now claimed,* that five years earlier in 1935 Congress had discarded the principle of "fair value" as the utility rate base under Section 208 of the Federal Power Act. The Commission, at page 203 of 32 P.U.R. (n.s.) declares:

"However, we believe the original cost of construction of the Boulder canyon line is the best evidence of the amount to be used as a rate base in this proceeding."

The Commission cites in support of this conclusion: *Clark's Ferry Bridge Co. v. Pennsylvania Public Service Commission* (1934), 291 U. S. 227, 54 S. Ct. 427, wherein this

Court held, in recognition of the governing principle of "fair value," that under the facts in that case the "reasonable cost of the structure furnished a proper basis for determining its *fair value.*" (Emphasis ours.)

Comment: Thus, as late as the early portion of the year 1940, the Power Commission had not undertaken to outlaw "fair value" either in its annual reports or in its decisions.

(B) YEAR 1940.

The Commission, reporting for the year 1940, proclaims:

"Space does not permit an extended discussion of all the details inherent in the regulatory problem. *Suffice it to say that the complications resulting from the 'fair value' theory, with its reproduction costs, its going value, its observed depreciation, etc., pose but a part of the problem which constantly confronts those charged with the responsibility for making regulation reasonably effective in the public interest.*

"The machinery for handling the regulatory problem cannot safely be confined to old methods. The regulatory agency is in fact a 'tribune of the people' designed to 'furnish protection to rights and obstacles to wrongdoing which, under our new social and industrial conditions, cannot be practically accomplished by the old * * * procedures' used in dealing with adversary suits in the law courts.

* * * * *

"The following important developments in rate making policy are reflected in the Commission's formal decisions issued during the last year:

"1. *The insistence by the Commission on a prudent investment rate base.*" (Emphasis ours.)

Annual Report, 1940, Federal Power Commission, pp. 13, 62.

Comment: It is to be observed that in 1940 the Commission, in seeking to revolutionize the law of rate base, *was undertaking to do so on its own power.* It is significant that *at that time* no contention was made that the governing principle of "fair value" had been cast aside and abrogated in the Federal Power Act (1935) or the Natural Gas Act (1938).

(C) YEARS 1941-1943.

(1) Thereafter, beginning with the case of "*In the Matter of Chicago District Electric Generating Corporation,*" *supra* (July 16, 1941), the decisions of the Commission departed radically from its own previous announcements, as well as the law of the land. The Commission, *In the Matter of Cities Service Gas Company* (July 28, 1943) (not officially reported—Comm. Docket No. G-141) expressly excludes and discards all evidence of "fair value," under the asserted authorization of Section 6(a) of the Natural Gas Act, and declares, by its reference to *The Matter of Chicago District Electric Generating Corporation, supra,* that such also was the intent and effect of its earlier ruling in that case.

(2) However, and strangely, in 1942, in the two extensive briefs filed by the Commission in this Court, in *Federal Power Commission v. Natural Gas Pipeline Company,* 315 U. S. 575, wherein the Commission renews extensively its attacks upon "the doctrine of *Smyth v. Ames*" (See *Railroad Comm. v. Pacific Gas & Electric Co.* (1938), 302 U. S. 388; *Driscoll v. Edison Light & Power Co.* (1938), 307 U. S. 104), no slightest suggestion was made that Congress, *as now contended,* had established or authorized the so-called "actual legitimate prudent cost" rate base and discarded and abrogated "fair value" as the controlling principle, in the Federal Power Act and the Natural Gas Act.

(3) Counsel for the Power Commission (George Slaff), appearing before the Public Utility Section of the American Bar Association in August, 1942, asserted in reliance on the special concurring opinion of Justices Black, Douglas and Murphy in the *Natural Gas Pipeline Company* case, *supra* (March 16, 1942), that fair value had been discarded and abrogated in that case. This assertion is made despite the statement of the Justices: "As we read the opinion of the Court, the Commission is now freed from the compulsion of admitting evidence on reproduction cost, or of giving any weight *to that element of fair value.*" (Emphasis ours.) Commission Counsel declared with finality:

"I look forward with avid anticipation to the gymnastics—intellectual or otherwise—with which some of you

here who represent the industry may attempt to dispel the rigor mortis of fair value which set in on March 16, 1942."

It seems evident that Counsel was not certain of his conclusions as to the force and effect of this Court's opinion in that case. Perhaps he had read the significant language of *Chief Justice Stone*, speaking for six members of the Court, who at page 590 of 315 U. S. declared: "*The total value* of the companies' plant, including equipment in excess of immediate needs when beginning business, has been included in the rate base adopted." (Emphasis ours.) For here is the express recognition of the application of the principle of value in that case.

And so later in his address we find Counsel declaring:

"*Consider first the pattern set by the Federal agencies.* No one can avoid the plain unvarnished fact that as far as both the Federal Power Commission and the Securities and Exchange Commission are concerned, fair value has been relegated to the limbo of outmoded doctrines." (Emphasis ours.)

Comment: Not Congress nor the Courts, but "the federal agencies," identified as the Federal Power Commission and the Securities and Exchange Commission, it seems have relegated to the limbo of outmoded doctrines" the principle of "fair value."

(4) The latest and most sweeping contention of the Commission with respect to its authority under the terms of the Natural Gas Act is as follows:

"The Natural Gas Act confers upon the Commission *a broad field of discretion for selection of an appropriate rate base.* This authority was upheld by the Supreme Court in the *Natural Gas Pipeline Company* case. Significantly, the Court did not specify so-called fair value, nor 'present value,' in applying its test; but it held that no 'single formula or combination of formulas,' governs rate base determinations (cf. 315 U. S. at p. 586)." (Emphasis ours.)

Brief Fed. Power Com. (August 30, 1943), *Canadian River Gas Co. v. Federal Power Comm.* (No. 2551, C.C.A. 10th Circ.) p. 34.

It thus appears that the Commission now proposes to

assume authority at large and at will to impose, from time to time in its rate-regulatory activities, whatever rate base it deems "appropriate." It would seem that if such a charter of authority may be thus developed, the legislative functions of Congress may be dispensed with entirely.

The Commission also assumes that when this Court in the *Natural Gas Pipeline Company* case *supra* stated, "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas," the principle of "fair value" was intended to be covered thereby, as being a mere formula, instead of the governing principle and end result. This Court as early as *1912* declared the same thing in *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 754. To the same effect are numerous decisions of this Court. See *Los Angeles Gas Company v. Railroad Commission*, 289 U. S. 287, 306, 53 Sup. Ct. 637, 644, and cases cited.

Yet the Commission, at this late date, asserts that when the Court in *1942* repeated its former identical declarations dating back to *1912*, the *1942* declaration is revolutionary, and does not mean the same thing as the same declarations made and several times repeated during the preceding 30 years.

(5) The claim frequently made that the Commission in arriving at its so-called "original cost," "actual legitimate cost" and "prudent investment" rate base "considered the evidence as to the claimed cost and the alleged value of the Company's property," is merely a self-serving tug by the Commission at its own boot straps. The legislative and judicial history of the Federal Power Act and the Natural Gas Act conclusively establishes the impropriety of any such contention. It is, of course, true that the Commission, before Congress, in its reports, in its public statements and in its opinions, has persistently and deliberately attempted to outlaw "fair value" as "the law of the land," and substitute therefor so-called "actual legitimate prudent cost." We use the word "impropriety" advisedly, for the Power Commission is a mere administrative agency, not possessed of either legislative powers or judicial functions, entitling it to make and declare "the law of the land." From the Commission Opinion, *Re Chicago District Electric Gen-*

erating Corporation (July, 1941), 39 P.U.R. (n.s.) 263, 269-272 to its latest Opinion (No. 95, July 28, 1943), *Re Cities Service Gas Company*, the rejection by the Commission of "fair value" has been uniform and complete. We quote again from its Opinion last rendered in *Re Cities Service Gas Company:*

"*Exclusion of 'Fair Value' Evidence.*

"At the threshold, we are met with the Company's contention that the trial examiner improperly excluded evidence of reproduction cost and *so-called* 'fair value' of the properties. Our views as to why such evidence should be excluded have been stated in earlier opinions (Citing: *Detroit v. Panhandle Eastern Pipe Line Company, et al.*, 45 P.U.R. (n.s.) 203, 208-210; *Re Chicago District Electric Generating Company*, 39 P.U.R. (n.s.) 263, 269-272), and need not be amplified here."

How then can it be said that consideration is given to "fair value," when the entire principle of "fair value" is rejected by the Commission. "Fair value" is treated as simply non-existent, and so obviously is not considered at all.

For example, "fair value" being "the law of the land," which principle the Commission rejects, its conclusions as to the so-called "actual legitimate cost" and "prudent investment" rate base are wholly irrelevant and without authority of law. There is no legal basis for such administrative determination. *It is not here a question of what evidence is or is not proper and admissible to establish "fair value," or what conclusions as to "fair value" may properly be drawn from evidence of original or historical cost (Los Angeles Gas Co. v. Railroad Comm.*, 289 U. S. 287, 309, 53 Sup. Ct. 637, 645). We are confronted with the rejection of the principle of "fair value" in its entirety.

"• • • If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and *which it has not made*, a judicial judgment cannot be made to do service for an administrative judgment. • • •

• • • • • •

"That the scope of such review is narrowly circumscribed is beside the point. For the courts can not exer-

cise their duty of review unless they are advised of the considerations underlying the action under review.

* * * * *

"* * * *if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.*

* * * * *

"* * * an administrative order can not be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." (Emphasis ours.)

Securities and Exchange Comm. v. Chenery Corp., (1943) ..... U. S. ....., 63 Sup. Ct. 454, 459, 462.

"* * * Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence. * * *"

United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 489, 62 Sup. Ct. 722, 730.

To the same effect this Court, speaking through *Chief Justice Stone*, with respect to the authority of the Federal Power Commission under the Natural Gas Act, recently declared:

"* * * Agencies to whom this legislative power has been delegated are free, *within the ambit of their statutory authority*, to make the pragmatic adjustments which may be called for by particular circumstances. *Once* a fair hearing has been given, proper findings made, and *other statutory requirements satisfied, then* the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. * * *" (Emphasis ours.)

Federal Power Comm. v. Natural Gas Pipeline Co. (1942), 315 U. S. 575, 586, 62 Sup. Ct. 736, 743.

Conclusion. The above summary of Power Commission position and decision as to *rate base* supplements the impressive legislative history showing that that body deems itself either exempt from the restraints of law or possessed of a virtually unlimited "discretion." In either event the

lawful source of such asserted authority is not disclosed. In fact the entire absence of such authority is affirmatively establised by the unambiguous terms of *Section 6* of the Natural Gas Act and *Section 208* of the Federal Power Act. The statutory construction indulged by the Commission involves and requires both additions to, eliminations from and substitutions for the statutory words and concepts to produce the meaning urged by it. The Commission "construction," so-called, amounts to far-reaching administrative legislation, nothing less and nothing else.